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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 36.

R. E. GRAHAM and E. E. FOSTER, Copartners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Copartnership,

Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE.*

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Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE.*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Tobacco Products Corporation, of New York, in a pending case involving the same

question at issue in the above-entitled case, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF *AMICI CURIAE.*

Statement.

This case was tried upon a motion for judgment upon the stipulated facts before the District Court for the Southern District of California, which, in January, 1929, decided that the petitioners were entitled to recover alleged taxes of $7,034.71 and alleged interest thereon of $2,004.69, or a total of $9,039.40, which they had paid to respondent after the statutory period of limitations for the collection thereof had expired (R. 15-19). The Circuit Court of Appeals, in

an opinion rendered November 4, 1929 (R. 36), reversed the decision of the District Court, on the ground that Section 611 of the Revenue Act of 1928 barred recovery by the petitioners. A writ of certiorari was granted by this Court on March 3, 1930.

The pertinent dates are as follows (R. 11-14):

March 22, 1918, return for 1917 filed.
January, 1920, additional assessment made.
February 11, 1920, claim in abatement filed.
December 27, 1922, claim in abatement rejected.
March 22, 1923, expiration of five year period for collection of tax.
November 19, 1924, notice and demand for payment of tax issued.
November 29, 1924, and December 3, 1924, tax collected.
September 25, 1925, claim for refund filed.
January 13, 1926, claim for refund rejected.
December 23, 1927, suit commenced.

Statutes.

The statutes immediately involved are Sections 607 and 611 of the Revenue Act of 1928, enacted May 29, 1928, and are as follows:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax)

was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

ARGUMENT.

Summary.

The right of the petitioners to recover the payments of alleged taxes arbitrarily enforced by the Collector when the collection of such alleged taxes was not legally enforcible would be undoubted, except for the subsequent enactment of Sections 607 and 611 of the Revenue Act of 1928. Section 607 merely characterizes as an *overpayment* a payment made after the running of the statute of limitations, and provides for the refund of such overpayment if claim therefor is filed within the statutory period. Section 611 withdraws from classification as overpayments within the operation of Section 607 cases having certain prescribed features. If, then, Section 607 does not repeal the law previously in force, so that a recovery could be had without resort to Section 607, Section 611 is also inapplicable. Even though Section 607 be held applicable, a recovery may still be had if the case does not fall unmistakably within the provisions of Section 611. Moreover, Section 611, if construed to embrace a case such as the present, is unconstitutional.

Accordingly, the following points are submitted:

I. The petitioners' right to recover is a common law right of *assumpsit* against the respondent personally for

money had and received, and is not based upon Section 607 or affected by Section 611 of the Revenue Act of 1928.

II. Section 611 of the Revenue Act of 1928 is not applicable to the present case.

A. Sections 607 and 611 of the Revenue Act of 1928 relate solely to administrative refunds and credits and are not applicable to recoveries in the courts.

B. Section 611 does not apply to any case where the payment was made involuntarily prior to its enactment.

C. In Section 611 the term "stayed" means something more than "voluntarily delayed".

1. That Congress had in mind something more than voluntary delay in collection when it used the term "stayed" in Section 611 may be gathered from earlier legislation in which this word or some similar expression was used.

2. That Congress recognized that the filing of an abatement claim did not in itself stay the collection of the tax is shown by its imposition of the qualifying clause, "if the collection of any part thereof was stayed", as well as by the history and practice relating to abatement claims.

3. Congress must have meant by "stayed" something more than voluntary delay in collection, because in every case to which Section 611 could be applied, assuming the omission of the conditional clause in question, there was delay in collection.

4. All of the provisions and conditions of Section 611 can be given effect if "stayed" is construed as meaning more than merely voluntary delay by the collector.

D. Within the meaning of Section 611 collection of the tax was not stayed, because petitioners' claim in abatement was rejected before the statute of limitations expired.

III. The bar of the statute of limitations against the United States in respect of the tax in suit not only operated to bar the remedy, but extinguished the liability under the common law and under the provisions of Section 1106(a) of the Revenue Act of 1926.

A. Under the common law.

B. Under the provisions of Section 1106(a).

C. Section 612 of the Revenue Act of 1928 could not revive a tax liability already extinguished.

IV. Section 611 as applied to the present case is unconstitutional because it takes property without due process of law.

A. The question at issue is not whether Congress may impose a retroactive tax, but whether it may take away from a private person a right to recover money that is absolutely due when the Act is passed.

B. The application of Section 611 to the case at bar would unconstitutionally deprive the petitioners of the vested claim which they had against the respondent at the time of its enactment.

C. Section 611 if construed as reimposing the tax or ratifying its collection is so arbitrary and capricious as to be void under the Fifth Amendment.

V. In any event Section 611 does not prevent the recovery of the interest in question in the present case.

The legislative history of Section 611, together with the comment of the American Bar Association Committee on Federal Taxation on original Section 611, is given in an appendix to this brief.

I.

The petitioners' right to recover is a common law right of *assumpsit* against the respondent personally for money had and received, and is not based upon Section 607 or affected by Section 611 of the Revenue Act of 1928.

Upon payment of the sums in question in the present case in 1924, when the collection thereof was barred by the statute of limitations applicable thereto, the petitioners acquired an absolute right to recover in an action against either the respondent or the United States on the ground

that the amounts collected were barred by the statute of limitations. *Graham* v. *DuPont*, 262 U. S. 234; *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346; *The Ellay Company* v. *Bowers*, 25 Fed. (2d) 637, certiorari denied 277 U. S. 606; *Peerless Woolen Mills* v. *Rose*, 24 Fed. (2d) 576; *Erie Taxi Co.* v. *Gnichtel*, 17 Fed (2d) 661; *Thornhill Wagon Co.* v. *Noel*, 17 Fed. (2d) 407.

The present suit against the respondent is not founded upon any statute, but is a common law action in *assumpsit*, for money had and received, against the respondent personally, and not against his office.

In the early administration of our customs laws a collector was held liable personally in a common law action of *assumpsit*, as for money had and received, for customs duties collected by him, if payment thereof was made under protest and duress, although he had paid the money into the Treasury of the United States. *Elliott* v. *Swartwout*, 10 Pet. (U. S.) 137. The collector was subjected to this liability because for his protection he had a right to retain the customs duties received by him. *Cary* v. *Curtis*, 3 How. (U. S.) 236. An Act of Congress of March 3, 1839, however, required collectors in all cases to pay over such moneys into the United States Treasury, and prohibited them from withholding any part thereof to await the result of any litigation. This deprivation of the right of retainer, it was held (*Cary* v. *Curtis*, *supra*), excluded the implied obligation or promise of the collector to repay the duties to the taxpayer, essential to the common law action of *assumpsit*, and therefore deprived the taxpayer of that action.

Upon the enactment of the Civil War income tax laws, Congress compelled collectors to pay all internal revenue taxes received or collected by them into the Treasury of

the United States, without any abatement or deduction on account of claims of any description (Section 3, Act of March 3, 1865; Section 3210, Revised Statutes). In the place of the old right of retainer, however, Congress provided for repayment to collectors of the full amounts of such sums of money as might be recovered against them in any court, for any internal revenue taxes collected by them, with the costs and expenses of suit (Section 3220, Revised Statutes, first enacted by the Internal Revenue Act of July 13, 1866). This Court then held that this allowance by Congress of the equivalent of the old right of retainer restored the common law obligation of the collector to repay the taxpayer the amount collected by him, and that the taxpayer could, therefore, again sue the collector in the common law action of *assumpsit* for money had and received. *City of Philadelphia* v. *The Collector*, 5 Wall. (U. S.) 720; *The Assessors* v. *Osbornes*, 9 Wall. (U. S.) 567.

In *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, this Court said (p. 31):

> "The right to sue the Collector for an unjustified collection was given by the common law."

Congress may, of course, limit the right of the taxpayer against the collector, as, for example, by providing against injunctions (Section 3224, Revised Statutes), requiring the filing of refund claims and limiting the time within which suit may be brought against the collector (Section 3226, Revised Statutes), and forbidding the issue of execution against the collector after a certificate of probable cause is granted (Section 989, Revised Statutes). See *White* v. *Weiss*, 7 Fed. (2d) 139. This fact, however, does not make the remedy against the collector a statutory remedy; and the several acts of Congress providing for the repayment

of excessive taxes, the payment of judgments against collectors, and the repayment to collectors of amounts recovered against them do not constitute a basis for an action against the collector. (See *Patton* v. *Brady*, 184 U. S. 608; *Coffey, et al.* v. *Exchange Bank*, 296 Fed. 807; *Fox* v. *Edwards*, 287 Fed. 669.)

The action against the collector for the recovery of taxes is personal and is not against the United States. *Sage* v. *United States*, 250 U. S. 33; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1. A judgment rendered in such an action is a personal liability unless and until the Court grants a certificate of probable cause, which permits payment of the judgment out of the United States Treasury. *Sage* v. *United States, supra.*

An analysis of Section 607 indicates that it was intended to apply to taxes *theretofore or thereafter* paid after the expiration of the period of limitation, and to provide for their refund to the taxpayer "if claim therefor *is* filed within the period of limitation for filing such claim." In other words, the section is applicable by express provision in the case of taxes paid before the enactment of the act, but is not applicable to claims for refund filed before the enactment of the act. There is no language extending the application of the section to claims for refund filed before the enactment of the act, and the strong implication from the context is that in this respect the section was not intended to be retroactive. Section 611 merely provides that in certain circumstances a payment of taxes shall not be considered as an overpayment under the provisions of Section 607, and it necessarily follows that, if Section 607 is inapplicable, Section 611 is likewise inapplicable.

Because petitioners' claim for refund was filed, and their suit was commenced and issue therein was joined, before

the enactment of Section 607, the action at bar is not and could not be based upon Section 607. That Section and Section 611 say nothing about actions in court or about collectors of internal revenue, and there is nothing in them which modifies, qualifies or derogates from the provisions of the common law.

II.

Section 611 of the Revenue Act of 1928 is not applicable to the present case.

A. Sections 607 and 611 of the Revenue Act of 1928 relate solely to administrative refunds and credits and are not applicable to recoveries in the courts.

The making of credits and refunds of overpayments of taxes, in the sense of their never having been due, has been authorized by each succeeding revenue act since the Revenue Act of 1916 (Section 14(a), Revenue Act of 1916; Section 252, Revenue Acts of 1918 and 1921; Section 281, Revenue Act of 1924; Section 284, Revenue Act of 1926; Section 322, Revenue Act of 1928). These sections have been held to have nothing to do with recoveries in the courts, but to relate solely to administrative credits and refunds by the Commissioner of Internal Revenue. (See *Fox* v. *Edwards*, 287 Fed. 669; *Coffey* v. *Exchange Bank*, 296 Fed. 807; *Alameda Inv. Co.* v. *McLaughlin*, 28 Fed. (2d) 81 (affd. 33 Fed. (2d) 120); *Winant* v. *Gardner*, 29 Fed. (2d) 836; *Rasmussen* v *Brownfield-Canty Carpet Co.*, 31 Fed. (2d) 89, 92; *Inland Products Co.* v. *Blair*, 31 Fed. (2d) 867, 868.)

Taxes collected after the statute of limitations applicable thereto expired were wrongful and illegal, but did not

constitute overpayments in the sense that the sums collected were never due as taxes. Such illegal collections were not, therefore, refundable under the sections cited above relating to overpayments, but were refunded under Section 3220 of the Revised Statutes, which, as amended by the Act of May 29, 1928, c. 901, 45 Stat. 986, 996, is as follows:

> "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section." (See Article 1301 of Regulations 69.)

Section 1106(a) of the Revenue Act of 1926 provided that "no credit or refund" in respect of a tax the liability for which was extinguished by the running of the statute of limitations "shall be allowed unless the taxpayer has overpaid the tax". This section, which perhaps in effect amended Section 3220 of the Revised Statutes, has been held to prohibit credits and refunds by the Commissioner of Internal Revenue and not to relate to suits in the courts.

Ellay Company v. *Bowers,* 25 Fed. (2d) 637, certiorari denied 277 U. S. 606; *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407; *Gove* v. *Nichols,* 23 Fed. (2d) 856.

In the case of *Adelaide F. Chapman* v. *United States,* 63 Ct. Cl. 424, the United States Court of Claims construed Section 1106(a) as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. On application by the taxpayer to this Court for a writ of certiorari, however, the Solicitor General joined the taxpayer in opposing this construction of that section. At this stage the Revenue Act of 1928 was enacted, substituting Sections 607 to 611 thereof in place of Section 1106(a) of the Revenue Act of 1926, which was repealed by Section 612 of the 1928 Act "as of February 26, 1926", the date of its enactment. This substitution was obviously to clear up the existing confusion as to the meaning of Section 1106(a). Thereafter this Court, upon the motion of the Solicitor General, reversed the Court of Claims in the case of *Chapman* v. *United States, supra,* remanding the case with directions to enter judgment for the taxpayer (278 U. S. 660).

It is thus clear that Section 607 merely authorized what was prohibited by Section 1106(a), that is, administrative credits or refunds by the Commissioner where barred collections had been made, even though there was no overpayment in the sense that the tax was never due. Like the sections which preceded it, Section 607 therefore has nothing to do with rights of action in the courts. Section 611, which merely declares what "shall *not* be considered an overpayment under Section 607" was obviously intended merely to preserve in certain cases the prohibition against administrative refunds which was formerly contained in Section 1106(a), and, like Section 1106(a), was not intended to have any application to the rights of taxpayers

to sue and recover in the courts. *Diamond Alkali Co.* v. *Heiner*, 39 Fed. (2d) 643; *Southern Lumber Co.* v. *United States* (U. S. D. C., W. D. Ark., May 6, 1930), C. C. H. 1930 F. T. S., vol. III, D. 9519.

B. Section 611 does not apply to any case where the payment was made involuntarily prior to its enactment.

It has been expressly so held by different judges in the following cases: *Bessemer Coal & Coke Company* v. *Heiner*, 39 Fed. (2d) 492; *Clinton Iron & Steel Co.* v. *Heiner*, 30 Fed. (2d) 542, 545; *Erie Coal & Coke Co.* v. *Heiner*, 33 Fed. (2d) 135, aff'd in 42 Fed. (2d) 214; *Burden, Smith & Co.* v. *United States*, 32 Fed. (2d) 830, 831; *Southern Lumber Co.* v. *United States, supra.*

As already shown above, Section 611 was designed solely for the control of the Commissioner in crediting or refunding taxes. However, even if applied to recoveries in the courts, that section does not cover payments made under duress before its enactment.

Section 611 in terms applies to any "payment", in the circumstances therein stated, "made before or within one year after" its enactment. No distinction whatsoever is drawn between payments made before or after the enactment of that section. The Commissioner recognized that only such payments as were *voluntarily* made after the effective date of the 1928 Act, in the circumstances stated in Section 611, come within its provisions, and after such date refrained from compelling the payment of barred taxes (Mim. 3660, Cumulative Bulletin VII-2, p. 82; G. C. M. 4197, *Id.* p. 87).

This distinction between voluntary and involuntary payments is equally reasonable and required when applied to payments made before the enactment of Section 611.

C. In Section 611 the term "stayed" means something more than "voluntarily delayed".

The condition and limitation in Section 611, "if the collection of any part thereof was stayed", has occasioned more dispute than any other clause of the section. There are perhaps three possible meanings that may be assigned to the term "was stayed": (1) it may be construed as a legal, compulsory stay; (2) it may be construed as a mere voluntary delay; and (3) it may be construed as something less than a compulsory stay and something more than voluntary delay, namely, a stay by mutual agreement.

The syllogism of the courts which have construed the term "stayed" as mere voluntary delay by the collector may be stated as follows: (a) Section 611 refers to a claim in abatement with or without bond; (b) there is no legal, compulsory stay without bond; (c) therefore, in order to apply Section 611 to a claim without bond, "stay" must mean merely voluntary delay.

The fallacy of this reasoning lies in the erroneous assumption that the stay specified in Section 611 must be either a legal, compulsory stay, on the one extreme, or a mere voluntary delay, on the other.

In arguing the Government's position it is said that there is no provision of law which would operate as a compulsory stay in a case where no bond was filed with the claim for abatement. Therefore, according to the Government, the interpretation of "stay" as a compulsory stay would render the statute ineffective in the case of abatement claims without bonds. On the other hand, the conclusion of the Government that "stay" means merely voluntary delay by the collector goes too far, because, as in every case which could possibly come within the scope of Section 611, regardless of the clause in question, there was

delay in collection, the interpretation of "stay" as voluntary delay deprives the qualifying clause of any effect just as completely as if it were entirely omitted from the statute.

Although it would seem more reasonable, if there were a real dilemma, to disregard the words "without bond" rather than the whole clause, "if the collection of any part was stayed", nevertheless it is entirely possible to give adequate effect to both expressions.

1. That Congress had in mind something more than voluntary delay in collection when it used the term "stayed" in Section 611 may be gathered from earlier legislation in which this word or some similar expression was used.

Section 234(a)(14) of the Revenue Act of 1918 was apparently the first statutory authorization for the filing of abatement claims by taxpayers, although abatement claims had long been filed under the Treasury regulations. It provided that for 1918, with respect to inventory losses and rebates, a claim in abatement, with bond, could be filed with the return, and that "payment of the amount of the tax covered by such claim shall not be required until the claim is decided".

Section 279(a) of the Revenue Act of 1924 permitted the taxpayer to file a claim for the abatement of a jeopardy assessment of income tax, if accompanied by a bond, and provided that "upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be *stayed* pending the final disposition of the claim". Section 312(a) of the Revenue Act of 1924 made similar provision with respect to jeopardy assessments of estate taxes.

Section 279(f) of the Revenue Act of 1926 and Section 273(f) of the Revenue Act of 1928 provide that the tax-

payer may obtain a *"stay of collection"* of the whole or any part of a jeopardy assessment of an income tax by filing a bond with the collector, and Sections 279(h) and 273(h) of said respective acts provide that "upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be *stayed*". Section 312(f) and (h) of the Revenue Act of 1926 makes similar provision with respect to jeopardy assessments of estate taxes.

Section 603 of the Revenue Act of 1928 provides that a judicial review of the determination of a deficiency by the Board of Tax Appeals "shall not operate as a *stay* of assessment or collection" of any part thereof unless a bond is filed.

In *United States* v. *John Barth Company*, 279 U. S. 370, where this Court held that the statute of limitations applicable to the collection of income taxes assessed under the Revenue Act of 1918 did not apply to a bond filed with a claim for the abatement of such assessment under the authority of Section 234(a) of the 1918 Act, Mr. Chief Justice Taft, writing for the unanimous Court, said (p. 375):

> "The plain purpose of par. 14(a)—(Section 234(a), Revenue Act of 1918)—was to effect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, and this with interest at the rate of 1 per cent. per month from the time the tax would have been due, had no such claim been filed. Of course, it is not difficult in the somewhat complicated provisions to suggest, as on behalf of respondent it has been suggested, that some other than the ordinary inference to be given to this set of facts should be drawn; but the common sense view of the

> return and the delay in the payment due after the claim of abatement and the giving of the bond, is as already stated. The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit cannot be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given."

Congress specifically authorized the filing of abatement claims only if accompanied by bonds. It used the terms "stay", "stayed" and "stay of collection" in the several revenue acts in connection with the filing of bonds, both with and without abatement claims. As Section 611 of the 1928 Act and the preceding revenue acts are in *pari materia*, Congress doubtless used the term "stayed" in Section 611 in the same sense as in the prior revenue acts (*Marks* v. *United States*, 161 U. S. 297). It necessarily follows, therefore, that Congress used the word "stayed" in Section 611 much in the sense that a bond stayed collection, as held by this Court in *United States* v. *John Barth Company, supra*.

2. That Congress recognized that the filing of an abatement claim did not in itself stay the collection of the tax is shown by its imposition of the qualifying clause, "if the collection of any part thereof was stayed", as well as by the history and practice relating to abatement claims. If the filing of an abatement claim actually stayed the collection of the tax, it would have been foolish for Congress to insert what on its face is a condition, but which would be met in all cases.

Under Section 3220 of the Revised Statutes the Government has always had authority for the abatement of taxes erroneously assessed and has always entertained claims for abatement, except as restricted by recent income tax acts. The filing of an abatement claim never, in any sense, "stayed" the collection of the tax. The collector might collect the tax regardless of the claim, or he might require a bond or the deposit of securities, or a waiver of the statute of limitations, for forbearance in collection, or he might voluntarily or inadvertently delay collection, as quite often happened where no abatement claim was filed. But his responsibility was clear and his duty free from doubt.

Regulations 14 of the Treasury Department, containing the general regulations relating to the abatement of taxes, has for years expressly prescribed:

> "FILING OF A CLAIM FOR ABATEMENT DOES NOT OPERATE AS A DELAY OF COLLECTION.—The filing of a claim for the abatement of a tax alleged to have been erroneously assessed does not operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax, and leave the taxpayer to his remedy by claim on Form 46."

A similar emphatic statement was embodied in Article 261 of Regulations 33 (revised), relating to the income taxes under the Revenue Acts of 1916 and 1917; in Article 1032 of Regulations 45, relating to the income taxes under the Revenue Act of 1918; and in Article 1032 of Regulations 62, relating to the income taxes under the Revenue Act of 1921. It is to claims for abatement filed under these acts that Section 611 purports to apply.

Article 1281 of Regulations 65, promulgated under the Revenue Act of 1924, which for the first time provided that the abatement claim must be accompanied by a bond, provided that upon the filing of the claim and bond, the collection of the assessment covered thereby "shall be *stayed* pending the final disposition of the claim".

Accordingly, although the Treasury permitted the filing of claims for the abatement of taxes assessed prior to June 2, 1924, without requiring that they be accompanied by bonds, it accepted such claims with the necessarily clear understanding, expressed over a period of many years, that the filing of such claims would in no way be permitted to delay or jeopardize collection of the tax. On the other hand, when after June 2, 1924, the Treasury said that collection of the assessment covered by the abatement claim shall be *"stayed"*, it, like Congress, used that term only in the situation where a bond was filed with the claim. That is, giving effect to the decision of this Court in *United States* v. *John Barth Company, supra*, the Treasury, like Congress, used the term "stayed" to mean something more than the delay of collection which might result from the collector's free exercise of his own volition.

3. Congress must have meant by "stayed" something more than voluntary delay in collection, because in every case to which Section 611 could be applied, assuming the omission of the conditional clause in question, there was delay in collection.

Clearly, to come within the provisions of Section 611 the abatement claim must have been filed *before* and collection must have been made *after* the statute of limitations ran (*G. C. M. 4879*, Cumulative Bulletin VII-2, p. 90; *G. C. M. 5665*, Cumulative Bulletin VIII-1, p. 130; *Neuland* v.

Bowers, 38 Fed. (2d) 842). In the case of every such abatement claim there was, therefore, some period of time, however short, during which the collector delayed collection. If the term "stayed" as used in Section 611 is construed to mean mere voluntary delay by the collector, it necessarily follows that in the case of every abatement claim referred to in Section 611 collection was stayed within the meaning of that section.

Not only is such a construction unauthorized by any of the revenue acts and contrary to the express provisions of all the regulations, but, if Congress had intended to use the term stayed in the sense of mere voluntary delay by the collector, it would have been natural and sufficient for it to enact Section 611 without the condition that collection shall have been stayed. The inclusion of that condition demonstrates conclusively that Congress had in mind that at least some of the abatement claims which it referred to in Section 611 did not stay collection, and is, therefore, conclusive evidence that Congress used the term stayed in Section 611 as meaning something more than mere voluntary delay in collection.

If stayed is construed to mean voluntary delay, its use in Section 611 is surplusage. Section 611 should, if possible, be so construed as to avoid an interpretation which renders the term stayed surplusage and so in effect amends the statute by striking out that word. (Compare *Cohen* v. *Gould* (S. Ct. of Minn.), 225 N. W. 435, 438.) Section 611 having expressly made itself applicable to abatement claims where collection was "stayed", and such an explicit statement of effect being meaningless if it was the intention to reach abatement claims generally, that is, where collection was merely voluntarily delayed, the inference follows that it was not the intention to apply the section to them when

collection was merely voluntarily delayed (see *Cohen* v. *Gould, supra*).

It was expressly so held by the District Court for the District of New Jersey in *William F. Taubel, Inc.* v. *Sturgess* (U. S. D. C., D. N. J., Nov. 8, 1930), C. C. H. 1930 F. T. S., vol. III, D 9657. This is the most recent case on the subject which we have been able to find. The Court in that case said:

> "The defense contends that the language of section 611: 'and if the collection of any part thereof was stayed' should be interpreted to mean merely 'a delay of proceedings to enforce collection by reason of the filing of a claim in abatement.' If such had been the legislative intent the phrase as used would be surplusage, since such interpretation would, beyond question, prevail if the phrase dealing with the word 'stay' had been entirely omitted from the section. Appearing, however, as it does, some meaning must be given to it if possible. * * * What, then, does the phrase relating to 'stay' mean? * * * A reasonable view to take concerning the meaning of the word 'stay' is: that it connotes a state of facts either under rules and regulations or under stipulations made pursuant thereto which would in effect restrain the collector from making collection pending the decision of a claim."

4. All of the provisions and conditions of Section 611 can be given effect if "stayed" is construed as meaning more than mere voluntary delay by the collector.

As we have seen, in some cases the filing of a bond with the abatement claim assured the collection of the tax and constituted a waiver in fact of the statute of limitations upon collection (*United States* v. *John Barth Company, supra*). In other cases the Government was similarly pro-

tected by a deposit of money in escrow, instead of the filing of a bond (*Pigott* v. *Poe,* 41 Fed. (2d) 273); by the making of a deposit in a bank as a guarantee of payment (*Mascot Oil Co., Inc.* v. *United States* (Ct. Cl), 37 Fed. (2d) 986); and by other forms of binding agreements. Section 611 includes all such arrangements of contractual stay where bonds were not filed.

An agreement properly entered into between the taxpayer and the Commissioner waiving the statutory period of limitations on collections permitted the Government to collect the tax, within the period agreed upon, after the statutory period of limitations expired, and such agreements were entered into in a large number of cases where abatement claims had been filed without bonds. Taxpayers executed such waivers because they were told by the Commissioner that consideration of their abatement claims could not be completed until after the statute ran, and upon the implied agreement, at least, by the Commissioner that he would, if waiver were filed, cause collection to be delayed until after his final action on the abatement claims. However, such of said waivers as were not executed strictly in accordance with the provisions of Section 250(d) of the Revenue Act of 1921 relating thereto did not, for that reason, constitute proper waivers under the statute, and have been held not to have waived the statutory period for collection (see *Nat'l. Tool Co.* v. *Routzahn,* 28 Fed. (2d) 914 (unlimited waiver and claim for credit); *Earle* v. *Commissioner of Internal Revenue,* 12 B. T. A. 96 (correspondence between the Commissioner and the taxpayer); *Wirt Franklin* v. *Commissioner of Internal Revenue,* 8 B. T. A. 977 (claim in abatement with bond); *G. C. M. 5739,* Cumulative Bulletin VIII-1, p. 127 (claim for overassessment and credit); *G. C. M. 4565,* Cumulative Bulletin VII-2, p. 169

(offer in compromise); *G. C. M. 2581,* Cumulative Bulletin VI-2, p. 95 (partial payment of additional assessment)). In such cases, where abatement claims were filed, if the statute had ostensibly been waived and collection had been delayed by reason of such waiver, it was perhaps for that reason unjust that a taxpayer should be permitted to recover the tax on the ground that it was collected after the statute ran. The most that Section 611 purports to do is to reach such cases, and those where deposits, guarantees, and similar binding agreements were involved, as well as those where bonds were filed.

The filing of an abatement claim in itself did not waive or extend the statutory period for collection (*G. C. M. 2757,* Cumulative Bulletin, VII-2, p. 302). Where nothing more was done by the taxpayer, the Government's failure to collect in due season was but the result of the negligence of its officers, to which the taxpayer in no way contributed.

Accordingly, by prescribing the condition in Section 611 "if the collection . . . was stayed" Congress contemplated some act of the taxpayer (*other than the mere filing of the claim in abatement*) which legally or morally tied the hands of the collector. *United States* v. *Burden, Smith & Company,* 33 Fed. (2d) 229; *Cutcheon* v. *Rafferty,* 34 Fed. (2d) 708; *Pepsin Syrup Co.* v. *Schwaner,* 35 Fed. (2d) 197; *Sugarland Industries* v. *Bass,* 36 Fed. (2d) 375.

D. Within the meaning of Section 611 collection of the tax was not stayed, because petitioners' claim in abatement was rejected before the statute of limitations expired.

The courts which have construed the term "stay" as voluntary delay by the collector proceeded upon the theory that the practice of the Bureau was to delay collection of taxes until abatement claims could be acted upon, it being

assumed at that time that there was no limitation on collection of an assessment by distraint; that because this assumption was held erroneous in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, it was found in many cases that the limitation on collection had expired while the claim in abatement was pending; that it is unjust that a taxpayer should be permitted to recover a tax on the ground that it was collected after the statute ran when in fact the statute expired while the collection was delayed by the abatement claim filed by the taxpayer; that Section 611 was enacted to meet this situation; and that the term "stayed" as used therein must, therefore, be held to mean voluntary delay. (See *Daniel Reeves, Inc.* v. *Anderson* (U. S. C. C. A., 2d Circ., July 21, 1930), C. C. H. 1930 F. T. S., vol. III, D 9494; *Imhoff-Berg Silk Dyeing Co.* v. *United States* (U. S. D. C., D. N. J., June 19, 1930), C. C. H. 1930 F. T. S., vol. III, D 9437; *North American Creamery Co.* v. *Willcuts*, 38 Fed. (2d) 483; *Regla Coal Co.* v. *Bowers*, 37 Fed. (2d) 373; *Wright & Taylor* v. *Lucas*, 34 Fed. (2d) 328.)

Accordingly, if, as these cases assume, the purpose of Section 611 was to withdraw the benefit of the statute of limitations from taxpayers who by filing abatement claims obtained a delay of collection until after the statute had run, Section 611 should have no application to cases where the delay in collection was caused by something other than the filing of an abatement claim. The Commissioner of Internal Revenue has so held (*G. C. M. 4879, supra; G. C. M. 5665, supra*).

Where the abatement claim was not rejected until *after* the statute ran it is possible that the collector in some cases voluntarily delayed collection until after the statute expired because of the pendency of the claim. Such cases present a nice question of fact, the proof of which has

given rise to some discussion (*Daniel Reeves, Inc.* v. *Anderson, supra*). In the present case there is no such embarrassment, for here the abatement claim was rejected three months *before* the statute of limitations expired, and the pendency of the claim could not possibly have caused the collector to delay collection until after the statute ran.

III.

The bar of the statute of limitations against the United States in respect of the tax in suit not only operated to bar the remedy, but extinguished the liability under the common law and under the provisions of Section 1106(a) of the Revenue Act of 1926.

A. Under the common law.

In *Campbell* v. *Holt,* 115 U. S. 620, this Court held that a statute of limitations on personal debts applied to the remedy only and might be repealed after the right of action against the debtor was barred because the statute of limitations in existence when the debt was incurred did not enter into or become a part of the *contract.* In later cases, involving *statutory obligations,* this Court distinguished *Campbell* v. *Holt* and held that the bar of the statute of limitations not only operated to bar the remedy, but extinguished the liability, because the statute of limitations was a constituent part of and operated as a limitation upon the *statutory liability. Danzer and Company* v. *Gulf and Ship Island R. R. Co.,* 268 U. S. 633; *Kansas City Southern Ry. Co.* v. *Wolf,* 261 U. S. 133; *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662; *Davis* v. *Mills,* 194 U. S. 451; *The Harrisburg,* 119 U. S. 199.

In *The Harrisburg* this Court said (p. 214):

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

In *Davis* v. *Mills*, Mr. Justice Holmes, writing for the unanimous Court and referring to the cases wherein the expiration of the statutory period of limitations extinguishes the liability, said (p. 454):

> "The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

This principle is equally applicable to the Government, that is, the United States may set up against itself a statute of limitations the expiration of which will absolutely extinguish its rights. See *United States* v. *Chandler-Dunbar Company*, 209 U. S. 447, 450; *Stockley* v. *United States*, 260 U. S. 532, 542.

Taxes are enforced contributions for the payment of public expenses (*Houck* v. *Little River District*, 239 U. S.

254, 265) and, although, when due, may be regarded as debts for the purpose of giving the Government priority in cases of insolvency (*Price* v. *United States,* 269 U. S. 492), they are not contractual obligations (*Lane County* v. *Oregon,* 7 Wall. 71; *United States* v. *Eggleston, et al.,* Fed. Cas. No. 15,027; *Meriwether* v. *Garrett,* 102 U. S. 472, 513). The claim of the United States for the payment of the tax obligation imposed by the revenue acts rests solely upon the statute, and when that statute provides that the tax can be collected only within a stated period of time, the limitation is necessarily a condition and part of the Government's right to collect and the taxpayer's obligation to pay the tax.

Section 250(d) of the Revenue Act of 1921, which is applicable to the case at bar, provides that income and profits taxes for 1917, among other years, "shall be determined and assessed within five years after the return was filed, . . . and no suit or proceeding for the collection of any such taxes . . . shall be begun, after the expiration of five years after the date when such return was filed". Thus the language of the statute is itself conclusive of the question involved. The law that created the obligation to pay and right to collect the taxes, by its terms, imposed the five-year period as a limitation upon such obligation and right and unmistakably indicated its purpose to extinguish the obligation and right by the lapse of time. Compare *Citizens' Bank* v. *Miller-Link Lumber Co.,* 16 Fed. (2d) 163; *Gove* v. *Nichols,* 23 Fed. (2d) 856; *Bessemer Coal & Coke Co.* v. *Heiner,* 39 Fed. (2d) 492.

That this was the purpose of the statute is clear. Mr. Hawley, a member of the House Committee on Ways and Means, which drafted the Revenue Act of 1921, in speaking on behalf of the proponents of the measure, on the floor

of the House, said (Congressional Record, Volume 61, page 5201) in reference to Section 250(d) of the Revenue Act of 1921 that it was "for the purpose of compelling the Government to close out its accounts with every taxpayer."

Continuing his address, Mr. Hawley stated:

> "A great many business transactions are suspended and are not consummated for the reason that the person intending to buy says: 'What liabilities are there on this property?' And, among others, there is stated to be a certain amount of tax in dispute. Men do not like to buy property, especially when the amount of tax in dispute is large. Many very important transactions have been lost, and this will open up the way to their settlement."

That the purpose of the statutes of limitations upon the assessment or collection of taxes which have been placed in the revenue acts is to enforce expedition upon the taxing authorities and insure that all tax liability shall cease upon the expiration of the periods of limitation is demonstrated by the successive reductions of the periods of limitation upon assessments and collections contained in the previous revenue acts. Compare Sections 250(d), Revenue Acts of 1918 and 1921, Sections 277 and 278, Revenue Acts of 1924 and 1926 and Section 275 of the Revenue Act of 1928, under which the periods of limitation on assessment have been reduced from five to two years from the date the return was filed, and with a fixed limitation in recent years of six years from the date of assessment within which collection may be had.

Income taxes collected after the statutory period of limitations, although due and owing prior to the running of the statutory period, are recoverable in actions at law against the collectors. *Graham* v. *DuPont*, 262 U. S. 234;

Bowers v. *New York and Albany Lighterage Company*, 273 U. S. 346. Such suits against collectors are not authorized by any statute, but must be brought as common law actions in *assumpsit*, for moneys had and received, and are personal to the collector, and not against his office. See Point I, *supra*; *Levy* v. *Wardell*, 258 U. S. 542; *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Sage* v. *United States*, 250 U. S. 33; *Patton* v. *Brady*, 184 U. S. 608. Actions in *assumpsit* for money had and received are based upon the fact that the person taking the same had no right thereto. Accordingly, the only basis upon which recoveries could have been recognized in *Graham* v. *DuPont*, *supra*, and allowed in *Bowers* v. *New York & Albany Lighterage Co.*, *supra*, was that at the time collection was forced the taxpayer was not obligated for the sums collected as taxes.

Statutes of limitations which bar the remedy only are matters of defense, and do not form a basis for affirmative actions such as are here involved. It follows, therefore, that the running of the statute of limitations provided in the revenue acts not only barred the remedy, but extinguished the liability.

This precise question was raised in *Bashara* v. *Hopkins*, 290 Fed. 592, 595, where the taxpayer sued to enjoin a forcible collection by distraint after the statutory period for collection had run, on the ground that while this fact was open to him as a defense in a suit to enforce collection it was not available as a basis for recovery after collection by distraint. The District Court held, as did this Court in *Graham* v. *DuPont*, *supra*, that injuction would not lie since the taxpayer had a right to sue the collector and recover after collection by duress was had, distinguishing this type of case from *Campbell* v. *Holt*, *supra*, by the fact that the running of the statute *extinguished the liability*.

The courts which have held that the running of the period of limitations contained in the revenue acts merely bars the remedy have based their decision upon the authority of *Campbell* v. *Holt, supra,* and have wholly failed to show how a mere matter of defense can form the basis for an affirmative action in *assumpsit.* It seems to have been assumed in those cases (*Huntley* v. *Gile, et al.,* 32 Fed. (2d) 857; *Wright & Taylor* v. *Lucas,* 34 Fed. (2d) 328; *Regla Coal Company* v. *Bowers,* 37 Fed. (2d) 373; *Rockland & Rockport Line Corporation* v. *Ham,* 38 Fed. (2d) 239; *North American Creamery Co.* v. *Willcuts,* 38 Fed. 483; *Oak Worsted Mills* v. *United States* (Ct. Cl.), 36 Fed. (2d) 529), that actions against collectors in such cases are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations provisions do not provide for suits for recoveries of sums collected in violation of such provisions. (See Point I, *supra.*)

The Court has held that limitations upon the time within which suits may be brought to recover taxes erroneously or illegally collected are substantive, and not mere matters of limitations to be raised as a defense. (*Cheatham* v. *United States,* 92 U. S. 85; *Arnson* v. *Murphy,* 115 U. S. 579, 586.) If limitations against the taxpayer are more than mere procedural limitations, then limitations against the United States ought to be similarly construed.

In the following cases it was held that the expiration of the statutory period of limitations upon the collection of income taxes extinguished the liability for the tax under the common law: *Citizens' Bank* v. *Miller-Link Lumber Co.,* 16 Fed. (2d) 163; *Bashara* v. *Hopkins,* 290 Fed. 592; *United States* v. *John Barth Company,* 27 Fed. (2d) 782, reversed on other grounds, 279 U. S. 370.

B. Under the provisions of Section 1106(a).

Section 1106(a) of the Revenue Act of 1926 provided that:

> "The bar of the statute of limitations against the United States in respect of *any internal-revenue tax* shall not only operate to bar the remedy but shall extinguish the liability; but no *credit or refund* in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. * * *" (Italics ours.)

In December, 1925, the United States Court of Claims, relying upon *Campbell* v. *Holt, supra,* and similar cases, decided in the case of *Toxaway Mills* v. *United States,* 61 Ct. Cl. 363, that the limitations contained in the Revenue Acts of 1918 and 1921 merely operated to bar the remedy and did not extinguish the liability. This decision resulted in the incorporation in Section 1106(a) of the above provision with respect to the bar of the statute of limitations.

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (House Report No. 356, p. 55, 69th Congress, First Session) as follows:

> "AMENDMENT No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft, C. J., in *Graham* v. *DuPont,* 262 U. S. 234, 256, 258.)"

Accordingly, the provision of Section 1106(a) of the Revenue Act of 1926 was intended merely to be declaratory

of the law, as it always had been, and was enacted to offset a contrary holding by the Court of Claims in the case of *Toxaway Mills* v. *United States,* 61 Ct. Cl. 363. Congress must, therefore, certainly have intended that the declaration in Section 1106(a) be applied to what had been done before as well as after its enactment.

The Court of Claims, in the case of *Adelaide F. Chapman* v. *United States,* 63 Ct. Cls. 424, construed Section 1106(a) of the Revenue Act of 1926 as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. However, the Solicitor General joined the taxpayer in opposing this construction of Section 1106(a), stating in his brief for the United States on application to this Court by the taxpayer for writ of certiorari in the *Chapman* case that:

> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in *Graham* v. *Dupont, supra,* or prevent distraint proceedings by injunction and may be compelled by the collector to pay a tax the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

As shown above (Point II A), for other cogent reasons, as well as those aforesaid, the provision in Section 1106(a) with respect to credit or refund relates solely to administrative credits and refunds and is not applicable to

recoveries in the courts, and has been so construed (*Ellay Company* v. *Bowers,* 25 Fed. (2d) 637, certiorari denied 277 U. S. 606; *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407; *Gove* v. *Nichols,* 23 Fed. (2d) 856).

In each of the *Toxaway Mills* and *Adelaide F. Chapman* cases, *supra,* the barred taxes were paid *before* the enactment of Section 1106(a), and this Court, on writ of certiorari, in each case, *after* such enactment, vacated the judgment and remanded the cause to the Court of Claims with directions to enter judgment for the taxpayer. (See *Toxaway Mills* v. *United States,* 273 U. S. 781; *Chapman* v. *United States,* 278 U. S. 660.) Section 1106(a) was also retroactively applied to extinguish the liability for the tax in other cases (see *Gove* v. *Nichols,* 23 Fed. (2d) 856; *United States* v. *John Barth Co.,* 27 Fed. (2d) 782, reversed on other grounds 279 U. S. 370; *Pepsin Syrup Co.* v. *Schwaner,* 35 Fed. (2d) 197, 199; *Wettengel* v. *Robinson,* 288 Pa. 362, 136 Atl. 673; *Carney Coal Co.* v. *Commissioner of Internal Revenue,* 10 B. T. A. 1397, 1403; *Appeal of D. C. Jackling,* 9 B. T. A. 312, 318).

C. Section 612 of the Revenue Act of 1928 could not revive a tax liability already extinguished.

The courts which have passed upon the question have held that where Congress has extinguished a tax liability it has no power to revive the liability, and that Section 612 can not, therefore, be retroactively applied so as to revive any tax liability that was extinguished under Section 1106(a) of the Revenue Act of 1926 (*Dobbins* v. *Commissioner of Internal Revenue,* 31 Fed. (2d) 935; *United States* v. *John Barth Co.,* 27 Fed. (2d) 782, reversed on other grounds in 279 U. S. 370; *Wyman, Partridge & Co.* v. *United States,* 41 Fed. (2d) 886; *Wettengel* v. *Robinson,* 288 Pa.

362, 136 Atl. 673; *Pepsin Syrup Co.* v. *Schwaner,* 35 Fed. (2d) 197; *Southern Lumber Co.* v. *United States* (U. S. D. C., W. D. Ark., May 6, 1930), C. C. H. 1930 F. T. S., vol. III, D 9519; *Peerless Woolen Mills,* 13 B. T. A. 1119).

This protection from revival by a change in the limitations law is certainly no less secure where the liability was extinguished by the common law.

IV.

Section 611 as applied to the case at bar is unconstitutional because it takes property without due process of law.

A. The question at issue is not whether Congress may impose a retroactive tax, but whether it may take away from a private person a right to recover money that is asolutely due when the act is passed.

It is, of course, well settled that a law of Congress imposing a tax may be retroactive in its operation. The courts which have held Section 611 to be retroactive (*Huntley* v. *Gile,* 32 Fed. (2d) 857, 859—followed below; *Wright & Taylor* v. *Lucas,* 34 Fed. (2d) 328, 333; *Regla Coal Co.* v. *Bowers,* 37 Fed. (2d) 373; *North American Creamery Co.* v. *Willcuts,* 38 Fed. (2d) 483) based their decisions on that principle and the supposed analogy of *United States* v. *Heinszen & Co.,* 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226, wherein the right of the Philippine Government to retain import and export duties laid and collected without authority was sustained, where thereafter Congress by retroactive legislation confirmed the unlawful action in collecting the duties. That analogy, however,

fails. As was recently recognized by this Court in *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 339:

> "A tax may be imposed in respect of past benefits so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. . . . But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."

If we apply that principle Section 611 is invalid.

That section does not purport to lay a tax for the first time. It presupposes that a tax has been laid by appropriate enactment, and has been ascertained and lawfully assessed against the individual taxpayers. If it has any effect as a ratification, it is only in the sense that it provides that moneys illegally collected shall not be refunded under the circumstances specified. Clearly, such ratification is invalid because if Congress had attempted to impose for the first time a tax limited to the special class of taxpayers who are within Section 611, it would have been so arbitrary and capricious as to be unconstitutional, as we shall see below.

In the instant case the tax was collected by the respondent at a time when, by reason of the expiration of the statutory period of limitations, not only the right of collection was barred, but the liability had been extinguished. The petitioners were denied relief by injunction; they could do nothing but pay the amount unlawfully demanded and seek their remedy in the present action. But they had an absolute right to such an action under the common law,—a right to recover a definite sum of money from the respondent personally, that was absolutely due them when Sec-

tion 611 was enacted. No ratification or reimposition of taxes is involved in this case. The sole issue here is whether Congress can take away from petitioners—private parties—their vested right to recover from the respondent a definite sum of money that he had extorted from them without right (*Clinton Iron & Steel Co.* v. *Heiner,* 30 Fed. (2d) 542; *Heiner* v. *Erie Coal & Coke Co.,* 42 Fed. (2d) 214; *Bessemer Coal & Coke Co.* v. *Heiner,* 39 Fed. (2d) 492).

B. The application of Section 611 to the case at bar would unconstitutionally deprive the petitioners of the vested claim which they had against the respondent at the time of its enactment.

A right of action is as much within the protection of the constitutional prohibition as tangible property. *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338. In the case at bar, at the time this suit was brought the petitioners had a vested claim against the respondent and a clear right to recover judgment against him. If Section 611, thereafter enacted, is construed as an attempt to deprive petitioners of that right, it is unconstitutional and void as a deprivation of property without due process of law under the Fifth Amendment. *William Danzer & Co., Inc.* v. *Gulf & Ship Island R. R. Co.,* 268 U. S. 633, and the cases therein cited; *Kansas City Southern Railway* v. *Wolf,* 261 U. S. 133; *Morgan's Louisiana & Texas R. R. & Steamship Co.* v. *Cocke,* 273 U. S. 656; *Peninsula Produce Exchange* v. *New York P. & N. R. R. Co.,* 152 Md. 594, affd. 276 U. S. 599; *United States* v. *John Barth Co.,* 27 Fed. (2d) 782, reversed on other grounds 279 U. S. 370; *Wyman, Partridge & Co.* v. *United States,* 41 Fed. (2d) 886; *Wettengel* v. *Robinson,* 288 Pa. 362; 136 Atl. 673; *Pepsin Syrup*

Co. v. *Schwaner,* 35 Fed. (2d) 197; *Southern Lumber Co.* v. *United States* (U. S. D. C., W. D. Ark., May 6, 1930), C. C. H. 1930 F. T. S., vol. III, D 9519.

C. Section 611, if construed as reimposing the tax or ratifying its collection, is so arbitrary and capricious as to be void under the Fifth Amendment.

This Court has recognized that an act of Congress purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment (*Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142, 276 U. S. 594; *Untermyer* v. *Anderson,* 276 U. S. 440). This is especially true as to the classification of the persons subject to tax (*Schlesinger* v. *Wisconsin,* 270 U. S. 230).

Section 611 in the original form proposed by the House and rejected by the Senate was unfair enough (see the Appendix hereto), but the section in its garbled, compromise form is even more discriminatory.

That the classification attempted in Section 611 is so arbitrary and discriminatory as to amount to confiscation is conclusively demonstrated by the following:

(1) Section 611 neither required nor authorized the collection *after* its enactment of the taxes described therein, and the Commissioner of Internal Revenue accordingly recognized that only voluntary payments made after the effective date of the 1928 Act came within the provisions of that section, and after such date refrained from compelling the payment of barred taxes (Mimeograph No. 3660, Cumulative Bulletin VII-2, p. 82; General Counsel's Memorandum No. 4197, *Id.,* p. 87; *Wettengel* v. *Robinson,* 288 Pa. 362, 136 Atl. 673).

(2) If Section 611 is applied retroactively, this distinction between voluntary and involuntary payments should also be given effect with respect to payments made *before* the enactment of the Revenue Act of 1928. The payments in the case at bar were made under protest and duress.

(3) In cases otherwise coming within Section 611, but in which, when the abatement claims were decided, the taxpayers did not pay the tax, but appealed to the Board of Tax Appeals, they were not denied the benefit of the statute of limitations because under the provisions of Section 906(e) of the Revenue Act of 1926, or of Section 601 of the 1928 Act, if the Board found that collection of the tax was barred by limitations, its finding was considered to be a decision that there was no tax liability. See *Philadelphia Lawn Mower Co.* v. *Commissioner of Internal Revenue,* 16 B. T. A. 435.

(4) Section 611 does not authorize the retention of taxes collected after the statute ran where collection was delayed by claims for credit (*G. C. M. 6296,* Cumulative Bulletin VIII-2, p. 152).

(5) Section 611 does not authorize the retention of taxes collected after the statute ran where collection was delayed by a protest (*G. C. M. 6308,* Cumulative Bulletin VIII-1, p. 132).

(6) As in cases where taxpayers filed credit claims or protests, or requested conferences, so in cases where they filed claims in abatement, without bonds or similar agreements, the Commissioner of Internal Revenue and the collectors were under no obligation, either expressed or implied, to delay collection of the taxes (Regulations 62 and

45, Article 1032; Regulations 33 (Revised), Article 261, par. 743; Regulations 14, Revised).

(7) Taxpayers who filed abatement claims, without bonds or similar agreements, are deprived by Section 611 of the right to recover barred taxes, on the ground that they were collected after the statute ran, whether or not they requested that collection be delayed. In the case at bar the abatement claim was rejected three months before the statutory period of limitations expired.

(8) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statute ran and more than one year after the enactment of the 1928 Act, even though the collection was delayed by an abatement claim.

(9) Section 611 does not authorize collection to be made from those who delayed collection by abatement claims, but who, prior to the 1928 Act, had recovered taxes collected after the statutory period therefor.

(10) Before the enactment of Section 611 taxpayers could not enjoin the forced collection of barred taxes because of their right to sue for and recover the same, and the petitioners were powerless to restrain the forced collection in question in this case.

(11) After the enactment of Section 611, if that provision were construed as requiring or authorizing the collection and retention of the barred taxes therein described, taxpayers, including the petitioners, could have enjoined collection thereof on the ground that, if paid, they could not sue for or recover the same (*Snyder* v. *Marks*, 109 U. S. 189; *Hill* v. *Wallace*, 259 U. S. 44; *Higgins Mfg. Co.* v. *Page*, 20 Fed. (2d) 948).

Those Courts which have held Section 611 to be a fair and reasonable enactment—and therefore a valid one—have based their decisions upon the ground that the collections specified in that section were delayed until after the expiration of the statutory period of limitations *by reason of acts of the taxpayers and in order to afford the taxpayers an opportunity for a hearing before payment.* Section 611, however, reaches only a very small part of the collections which were so delayed. In fact, it excludes all of such collections except those of a very limited class, to wit, where (1) an abatement claim was filed, (2) collection was made prior to enactment of the act, and (3) there was no recovery of the collection before such enactment.

This exception is artificial and without any reasonable basis whatsoever. It takes the property of a relatively small group of taxpayers and does not touch the property of a vastly larger group of taxpayers who are in precisely the same situation. Such a purported classification does not rest on any reasonable distinction and is so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment.

V.

In any event Section 611 does not prevent the recovery of the interest in question in the present case.

The petitioners seek to recover the sum of $7,034.71, which the respondent forced them to pay to him as alleged additional *taxes,* and the sum of $2,004.69, which the respondent forced them to pay to him as *interest* on said alleged additional taxes (Record 4, 12.)

Sections 607 and 611 of the Revenue Act of 1928 in terms apply to taxes and interest, but by reason of an express condition in Section 611 that section is applicable only to such taxes and interest as were "*assessed* prior to June 2, 1924".

The facts stipulated in the case at bar show that said alleged tax in the sum of $7,034.71 was assessed prior to June 2, 1924, but that no assessment was made of any part of the alleged interest of $2,004.69. (Record, pp. 10, 11 and 12.)

It necessarily follows, therefore, without citation or further argument, that Section 611 has no application to petitioners ' ght to recover said interest.

Conclusion.

For the reasons above set forth, it is respectfully submitted that Section 611 should not be construed as applicable to the case at bar, but, if so construed, that it is so arbitrary, capricious and discriminatory as to be in violation of the Fifth Amendment and therefore void.

December 8, 1930.

Respectfully submitted,

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Appendix.

Section 611 of the Revenue Bill of 1928, as it was passed by the House of Representatives on December 17, 1927, reads as follows:

> "SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.
>
> If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed; then—
>
> (a) the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection; and
>
> (b) a distraint or proceeding in court for the collection of such part may be begun within one year after the enactment of this Act."

The Committee on Ways and Means of the House in its Report No. 2, 70th Congress, stated as follows (p. 34):

> "SEC. 611. COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.
>
> Prior to the enactment of the Revenue Act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would

have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment."

With respect to the section in its then form the Committee on Federal Taxation of the American Bar Association, in a report on March 31, 1928, which was furnished to the Committee on Finance of the Senate, commented as follows:

"Section 611 is vicious for the following, among other, reasons:

1. It is disingenuous and ambiguous. It infers that a claim in abatement is a request for delay in the collection of a tax. On the contrary, a claim in abatement asks for immediate action, that is, that the Commissioner of Internal Revenue shall immediately cancel or abate a tax which he has previously assessed. Any delay in acting upon the taxpayer's request for this action is the Treasury Department's delay, and not an accommodation to the taxpayer. The clause in the first paragraph of the section 'if the collection of any part thereof was stayed,' must mean stayed either by the claim in abatement or in some other unexplained way. It can scarcely mean the former, because the collection of no tax was ever stayed by a claim in abatement. Regulations 14 of the Treasury Department, embodying instructions concerning the abatement of taxes, expressly prescribes (p. 14):

> 'FILING OF A CLAIM FOR ABATEMENT DOES NOT OPERATE AS A DELAY OF COLLECTION.—The filing of a claim for the abatement of a tax alleged to have been erroneously assessed does not operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax, and leave the taxpayer to his remedy by claim on Form 46.'

2. It is retroactive legislation without parallel, it revives taxes assessed more than six years ago, and it affects chiefly taxes ten years old. Its language would apply to taxes under the Revenue Act of 1913, or even the Civil War statutes, long since barred and forgotten. Although no other recent

statute, nor even in general the pending bill, has purported to allow collection subsequently to six years after assessment, yet in those cases where abatement claims were once filed, no matter when decided, collection might still be made of taxes assessed six or more years ago. Moreover, the great majority of taxes involved in its application are 1917 and 1918 taxes, on which the period of limitation under previous acts ran prior to June 2, 1924. In other words, Congress is asked by the Treasury Department to reopen controversies, barred nearly four years, relating to taxes nine and ten years old. Is there to be no end?

3. It directly reverses the consistent policy of Congress, it savors of bad faith, and it lacks mutuality. Since 1913 Congress has increasingly recognized the wise policy of statutes of limitation, or of peace, or repose, as they are sometimes called. The proposed provision, as stated by the Ways and Means Committee, 'merely (*sic*) withdraws the defense of the statute of limitations'. Congress has given taxpayers the right to believe that defenses once gained would not be taken away. Where limitations have previously been extended, they have excepted periods of limitation already expired. (See Section 278(c) of the Revenue Acts of 1924 and 1926.) Congress has repeatedly refused to let down the bar of the statute of limitations in the case of taxpayers who learned too late, as a result of a decision of the Supreme Court in some other case, that they had overpaid their income taxes for a prior year. It is said that such taxpayers could have protected themselves by seasonably filing claims and suits, if they had been diligent. The same consideration applies with greater force to the Treasury Department, which should know the tax laws.

4. It assumes to legalize and ratify unlawful acts. The Treasury Department, after it knew the statute

of limitations had run, and contrary to the statutes enacted by Congress, has collected by force, or by threat of force, barred taxes. It now asks Congress to ratify its unlawful acts. The plain question is this: Are we going to have a system of tax administration whereby the Treasury Department may defy a statute of limitations imposed by Congress, take the money of the taxpayers unlawfully, and, when told by the Supreme Court to pay it back, obtain the passage of an Act of Congress purporting to destroy the rights of the taxpayers and to authorize the retention of the money exacted?

5. It destroys public confidence and it impairs the rights of third parties. If such a section as this becomes law, no taxpayer can ever in the future rely on a statute of limitations or feel reasonably sure that his tax liability for any year in the past will not be reopened. First taxpayers were told that tax claims would be barred after five years. After the expiration of such period many of them allowed evidence of their transactions to become cold and dissipated and otherwise changed their positions. Now they are told that barred tax claims will be enforced unless they can disprove them. Moreover, many purchases of corporate properties have been made by third persons in reliance on any further tax controversy for prior years have been barred by limitation. It is these third persons who will be largely affected by the proposed provision.

6. It nullifies the decision of the United States Supreme Court in *Bowers* v. *New York & Albany Lighterage Company* and it is based on misapprehension. The Supreme Court interpreted the intent of Congress as embodied in the Revenue Act of 1921. The Treasury Department now wants Congress to mean something else, and to change its mind as of November 23, 1921. The Ways and Means Committee

of the House was led to believe that the Treasury Department was surprised by the Supreme Court's construction of the Revenue Act of 1921. (See Report to accompany H. R. 1 at page 34.) The Treasury Department was aware of the litigation long pending and should have safeguarded itself against the probable outcome.

7. It is of doubtful constitutionality, it is discriminatory, and it will breed litigation. Section 1106(a) of the Revenue Act of 1926 expressly provided that the bar of the statute of limitations extinguished the liability. Can Congress by fiat recreate a tax liability heretofore extinguished? If Congress cannot authorize the collection of unpaid taxes heretofore extinguished by the bar of the statute, it is unfair to those taxpayers from whom collection of barred taxes was made by force to permit the Treasury Department to retain with impunity such unlawful collections. Because of its probable unconstitutionality, its ambiguity, the effect of provisions of other acts, and other questions of law, as well as the knowledge on the part of taxpayers that they have been deprived of rights which they believed secure, the courts will be flooded with litigation."

Section 611 of the House Bill was entirely omitted from the Revenue Bill of 1928 as it was passed by the Senate on May 21, 1928. The Committee on Finance of the Senate in its Report No. 960, 70th Congress, stated as follows (p. 42):

"COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.

Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts

paid after the running of the statute of limitations in such cases. Your committee believes that the bar of the statute should be made effective as to both the Government and the taxpayer and recommends that this section be eliminated."

The Conference Committee restored to the Bill part of the original Section 611, such fragment being thus included in the Revenue Act of 1928 as it now stands. The Conference Report (House Report No. 1882, 70th Congress) stated as follows (p. 6):

"Amendment numbered 190:

That the House recede from its disagreement to the amendment of the Senate numbered 190, and agree to the same with an amendment, as follows:

In lieu of the matter proposed to be stricken out by the Senate amendment insert the following:

Sec. 611. Collections stayed by claim in abatement.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

And the Senate agree to the same."

The Managers on the part of the House in a statement appended to the Conference Report explained as follows (p. 22):

"Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection."